

FEDERAL CIRCUIT COURT OF AUSTRALIA

*JAIPAL v MINISTER FOR IMMIGRATION &
ANOR*

[2016] FCCA 714

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration & Refugees Division) – Partner Temporary (Class UK) visa – show cause hearing – whether the applicant has an arguable case – whether applicant was in a genuine spousal relationship – no arguable case identified – application dismissed under r.44.12.

Legislation:

Migration Act 1958 (Cth), ss.5F, 476

Migration Regulations 1994, reg.1.15A(3), cl.820.211(2)(c)(ii), sch.2

Federal Circuit Court Rules 2001, r.44.12

Applicant:	JAIPAL JAIPAL
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 3273 of 2015
Judgment of:	Judge Street
Hearing date:	1 April 2016
Date of Last Submission:	1 April 2016
Delivered at:	Sydney
Delivered on:	1 April 2016

REPRESENTATION

The applicant appeared in person

Solicitors for the First
Respondent:

Mr L Dennis
Minter Ellison

ORDERS

- (1) The application is dismissed pursuant to r.44.12 of the *Federal Circuit Court Rules 2001*.
- (2) The applicant pay the costs of the first respondent fixed in the amount of \$3416.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 3273 of 2015

JAIPAL JAIPAL

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) in respect of a decision of the Tribunal made on 5 November 2015 affirming a decision of the delegate not to grant the applicant a Partner Temporary (Class UK) visa. The applicant is a national of India and arrived in Australia on 4 May 2010 on a subclass 572 visa which was cancelled on 3 September 2010. The applicant applied for protection on 2 December 2011 and that application was refused and an appeal to the Refugee Review Tribunal affirmed that refusal on 24 May 2013.
2. The applicant lodged a valid application for a UK Partner Temporary and BS Partner Residence visa on 16 July 2013 on the grounds of being in a spousal relationship with an Australian citizen. On 22 August

2014, the delegate refused that application and found that the criteria for the grant of a Partner Temporary (Class UK) (subclass 820) and Partner Residence (Class BS) (subclass 801) visa were not met.

3. The applicant applied for review to the Tribunal. The Tribunal identified that the delegate found the applicant did not meet the timeframe requirements for the visa and there were no compelling reasons not to apply the requirements and, therefore, the applicant did not meet an essential requirement. The Tribunal referred to the applicant refusing the grant on the basis that the applicant did not satisfy cl.820.211(2)(c)(ii) of Schedule 2 to the *Migration Regulations 1994*.
4. The Tribunal referred to the issue in the present case being whether the applicant and his sponsoring spouse were in a genuine spousal relationship at the time the application was made for the grant of the visa and at the time of the decision and, if so, whether there were compelling reasons that existed at the time of the application for not applying Schedule 3 of the requirement. This is a case where the Tribunal determined the matter on the basis of whether there was a genuine spousal relationship at the time of the application and at the time of the decision. The Tribunal did not determine the matter in relation to compelling reasons.
5. The Tribunal identified the requirements in relation to the spousal relationship by reference to s.5F and also reg.1.15A(3). It is apparent from the structure and content of the Tribunal's reasons that it addressed each of the criteria required under s.5F and under reg.1.15A(3). Relevantly, the Tribunal made adverse findings of credit and did not accept that the parties have ever lived together. The Tribunal found that the evidence as to the nature of the parties' household was inconsistent with the applicant and sponsor being in a genuine and continuing relationship.
6. The Tribunal was not prepared to accept, on the basis of the evidence before it, that the parties had ever pooled their financial resources or shared day-to-day household expenses and the Tribunal found the financial aspects of the relationship were not consistent with the parties being in a genuine and continuing spousal relationship. The Tribunal

found that the social aspects of the relationship were not consistent with the parties being in a genuine and continuing relationship.

7. The spouse at the time of the hearing before the Tribunal and at the time of the hearing before the Court is still in jail. The Tribunal found there was no independent evidence of any commitment to the relationship by either party and the Tribunal was not prepared to accept on the basis of the evidence before it that the applicant and his sponsor provide one another with emotional support or that they see the relationship as long term. It was in those circumstances that the Tribunal found it was not satisfied that, at the time of the visa application and the time of the decision, the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship is genuine and continuing.
8. Accordingly, the Tribunal found that the applicant did not meet cl.820.211(2)(a) and affirmed the decision of the delegate. On 4 February 2016, a Registrar of the Court fixed the matter for hearing as a show cause hearing under r.44.12 of the *Federal Circuit Court Rules 2001*. The Registrar also gave the applicant an opportunity to file affidavit evidence, submissions and an amended application. No such documents were filed.
9. At the commencement of the hearing of the matter before this Court, the Court explained to the applicant the nature of a show cause hearing under r.44.12 of the *Federal Circuit Court Rules 2001*. The Court explained that it was an opportunity to determine whether or not the applicant had an arguable case. The Court explained that an arguable case required legal error by the Tribunal or an arguable legal error by the Tribunal. The Court explained that the relevant type of legal error was in excess of statutory powers by the Tribunal or a denial of procedural fairness. The applicant confirmed that he understood the nature of the hearing as explained by the Court.
10. The application in the present case raises the following grounds:
 1. *I AM MARRIED TO AUSTRALIAN CITIZEN CATHY PATRICIA ADAMSON. AT THE TIME OF APPLICATION, I WAS ON BRIDGING VISA C. MY WIFE WAS MEDICALLY NOT FIT TO LOOK AFTER HERSELF AT HER OWN. SHE USE TO HAVE REGULAR FITS DUE TO HER CHRONICAL MEDICAL*

CONDITION. SHE IS REGULARLY ON DISABILITY PENSION DUE TO HER MENTAL DISABILITY. DUE TO HER THIS CONDITION, SHE HAD FIGHT WITH HER EX HUSBAND AND SHE IS PRESENTLY SERVING JAIL TERM. SHE NEEDS REGULAR MONITORING FROM AFFECTIONATE PERSON LIKE ME. I DESCRIBED MY COMPELLING REASONS TO DIBP BUT THEY DID NOT CONSIDER COMPELLING REASONS EVEN THOUGH CATHY (AUSTRALIAN CITIZEN) WOULD HAVE BEEN AFFECTED IF I HAD GONE AWAY FROM HER TO LODGE MY VISA APPLICATION OFFSHORE.

2. I LODGED ONSHORE APPLICATION TO HELP AND SUPPORT MY WIFE (AUSTRALIAN CITIZEN) WHO HAD CRITICAL MEDICAL CONDITION AT THE TIME OF APPLICATION.

3. I AM SUPPORTING MY WIFE NOT ONLY FINANCIALLY BUT ALSO MORALLY AND PSYCHOLOGICALLY TO HELP HER COME OUT OF SUCH MEDICAL MENTAL CONDITION. SHE NEEDS ME AT ALL TIMES FOR SOCIAL AND PSYCHOLOGICAL SUPPORT.

4. I APPLIED FOR AAT REVIEW. MY WIFE IS IN JAIL DUE TO FIGHT WITH HER EX HUSBAND. THIS FIGHT HAPPENED DUE TO HER MEDICAL CONDITION AND BECAUSE I WAS AWAY FROM HER. SHE CAN HARM HERSELF IN MY ABSENCE. I STATED ALL FACTS TO AAT. MY WIFE SENT A LETTER TO AAT FROM JAIL BUT STILL AAT DID NOT GIVE FRESH LOOK TO MY CASE.

5. I HAD GREAT EXPECTATION FROM ADMINISTRATIVE APPEALS TRIBUNAL BUT AAT DID NOT TOOK OUR COMPELLING CIRCUMSTANCES IN TO CONSIDERATION AND JUST AFFIRMED THE DECISION WITHOUT GIVING FRESH LOOK TO MY CASE.

6. AAT DECISION HAS BADLY AFFECTED AN AUSTRALIAN CITIZEN (MY WIFE).

7. MY WIFE WILL FACE SEVERE FINANCIAL AND PSYCHOLOGICAL HARDSHIP IF I HAVE TO LEAVE AUSTRALIA TO LODGE MY VISA APPLICATION OFFSHORE. SHE IS STILL UNDER MEDICATION FOR HER MENTAL CONDITION. SHE NEEDS MY MORAL SUPPORT TO LIVE NORMAL LIFE

11. None of the content of the grounds identify any arguable legal error by the Tribunal. The grounds are, in substance, an impermissible challenge to the adverse findings of the Tribunal as to the merits of the matter. The adverse findings of the Tribunal were open on the material before the Tribunal and cannot be said to lack an evident and intelligible justification.
12. In the course of the hearing, the applicant indicated that he wished to tender letters in relation to the relationship between himself and his spouse. The applicant confirmed that they were letters that were not before the Tribunal. The Court rejected that tender on the basis that the letters were irrelevant to determining whether there was legal error by the Tribunal. In the course of the hearing, the applicant also indicated that he wanted more time and the Court clarified whether the applicant was seeking an adjournment and the applicant indicated he did wish to seek an adjournment.
13. The applicant indicated that he wanted the adjournment so as to try and bring more evidence and, alternatively, so he could try and obtain a lawyer. When asked about the nature of the evidence he wanted to bring, the applicant identified he wanted to put on further material relating to the nature of the relationship with his spouse. This would not be a permissible exercise in relation to the jurisdiction of this Court.
14. The Court asked the applicant why it should have any confidence that an adjournment would give rise to the applicant being able to obtain a lawyer and nothing said by the applicant identified any basis upon which the Court could be confident an adjournment would have been productive of obtaining any legal representation. Further, no earlier notice had been given of any adjournment to the first respondent. The adjournment was opposed by the first respondent. I am satisfied that, in the circumstances of this case, an adjournment would be of no utility and would only unnecessarily increase the costs of the parties and utilise limited Court time. It was for these reasons that the adjournment was refused.
15. The applicant identified the hardship to both him and his spouse if the visa application was not granted and sought to agitate the merits of the application. The applicant referred to there being material that he had

given to his solicitor that had not been provided to the Tribunal. That is not a basis that can give rise to any legal error by the Tribunal. The applicant also expressed concern as to whether the Tribunal had taken into account his spouse's medical conditions. It is apparent from para.14 and para.39 that the sponsor's epilepsy and medical condition was taken into account by the Tribunal.

16. I accept the submissions of the first respondent and nothing said by the applicant from the bar table identified any basis upon which there could be said to be any arguable legal error or jurisdictional error by the Tribunal. I am satisfied that the application fails to disclose any arguable case. I am satisfied that it is an appropriate case in which to exercise the Court's powers under r.44.12 of the *Federal Circuit Court Rules 2001*.

I certify that the preceding sixteen (16) paragraphs are a true copy of the reasons for judgment of Judge Street

Date: 5 April 2016